90-818 (1)

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

PAUL A. RICHTER, an individual dba "THE BODY SHOP", Petitioner,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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dba "THE BODY SHOP"

QUESTIONS PRESENTED

1. Does the regulation of the First Amendment interest per se carry a presumption of constitutionality?
2. Is there an attendant "burden of proof" required to defend a constitutional challenge to regulation of a First Amendment interest?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION(S) BELOW	3
JURISDICTION	4
STATUTE/MUNICIPAL CODE INCLUDED	5,
STATEMENT OF CASE	9
REASONS FOR GRANTING WRIT ...	14
POINT I	
Presumption of Unconstitutionality Applies To City Ordiance Regulating The First Amendment Interests Of Petitioner.....	14
POINT II	
The Proper Regulation of First Amendment Interests In Terms Of Time, Place, And Manner, Requires A Showing Of Furtherance Of Significant Governmental Interest.....	17
CONCLUSION.....	19
APPENDIX "A" - Supreme Court of the State of California Order Denying Review After Judgment by the Court of Appeal August 15, 1990	

APPENDIX "B" - Opinion of the California Court of Appeal, Fourth Appellate District May 25, 1990

APPENDIX "C" - Memorandum Decision, Superior Court of California February 22, 1989

TABLE OF AUTHORITIES

CASES	PAGE
BSA, Inc. v. King County, (9th Cir. 1986) 804 F.2d 1104.....	17
Ellwest Stereo Theaters, Inc. v. Wenner, 681 F.1243, 1245 (9th Cir. 1982).....	15,17
Morris v. Municipal Court (1982) 32 Cal.3d 533.....	15,16
Municipal Code	
San Diego Municipal Code Chapter III, Article 3, Division 36, Section 33.3610(e),(f),(g)..	5,10,12

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No. _____

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v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

On appeal from the Supreme Court of California

The Petitioner, PAUL A. RICHTER, respectfully prays that a Writ of Certiorari issue to review the order denying review after judgment by the Court of Appeal by the Supreme Court of California, entered in the

above-entitled proceeding on

August 15, 1990.

OPINION(S) BELOW

August 15, 1990 the order of the Supreme Court of the State of California denying review after judgment by the Court of Appeal, Fourth Appellate District, is reprinted and attached as Appendix "A".

The Opinion of the Court of Appeal, Fourth Appellate District, Division One of the State of California (Kremer, P. J.) filed May 25, 1990 has not been reported. It is reprinted as attached Appendix "B".

The Decision of the Superior Court of San Diego County, State of California, (James R. Milliken, Judge) filed March 3, 1989, has not been reported. It is reprinted as attached Appendix "C".

JURISDICTION

On February 22, 1989, the Superior Court of San Diego entered a Decision granting Respondents' Motion for Summary Judgment. Petitioner then appealed to the Court of Appeal, Fourth Appellate District, Division One, of the State of California on May 25, 1990. The Court of Appeal affirmed the Superior Court's Decision. The Petitioner then petitioned for review in the Supreme Court of the State of California. The Supreme Court denied the petition for review on August 15, 1990.

The jurisdiction of this Court to review the judgment of the Supreme Court of California is invoked under 28 U.S.C. §§1257 and 2101, Rule 10 of the rules of the Supreme Court of the United States.

STATUTE/MUNICIPAL CODE INVOLVED

San Diego Municipal Code, Chapter III, Article 3, Division 36, Section 33.3610:

"Sec. 33.3610 Nude Entertainment Business - Operating Requirements.

No person, association, partnership, or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of nude entertainment business unless each and all of the following requirements are met:

(a) Each person employed or acting as a nude entertainer shall have a valid permit issued pursuant to the provisions of this Division, and it shall be unlawful for any owner, operator, responsible managing employee, manager or permittee in

charge of or in control of a nude business to employ or permit any person to act as a nude entertainer who is not in possession of valid, unrevoked Nude Entertainer Permit, which permit shall be prominently displayed with the permit required of the business.

(b) The possession of a valid Nude Entertainment Business License does not authorize the possessor to perform services for which a Nude Entertainer Permit is required.

(c) It shall be unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of a nude entertainment business to allow any person below the age of eighteen (18) years upon the premises or within the confines of any nude entertainment

business.

(d) Nude entertainment services shall be conducted or carried on only between the hours of 6 a.m. and 2 a.m. of the following day.

(e) No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises. Regulatory only within this Article.

(f) No responsible person, as defined in this Article, shall permit or allow at licensed premises any patron to approach within six feet of a nude entertainer, or permit or allow a nude entertainer to approach within six (6) feet of a patron. Regulatory only within this Article.

(g) All employees of nude entertainment businesses, other than nude entertainers while performing,

shall, at a minimum while on or about the licensed premises, wear an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region, and the breasts of a female including the areola thereof. Regulatory only within this Article."

STATEMENT OF THE CASE

Petitioner operates a business offering theatrical demonstrations or exhibitions, amusements, and viewing by a knowingly consentual audience desirous of viewing same in the assertion of his/her/their First Amendment rights. Said business is located in the City of San Diego, County of San Diego, State of California. The conduct of Petitioner's business is authorized as a theatre under the San Diego Municipal Code ("SDMC") and a permit has been duly issued.

Respondent CITY did allegedly enact, adopt, and amend various sections of certain ordinances under the SDMC. More specifically, the section of certain ordinances which are the subject of this petition are

designated under Division 36, 33.3610. The Petitioner did not seek an exemption from regulation under Division 36 because Petitioner does not hold a license pursuant to Division 36. Respondent CITY notified Petitioner of its intention to sanction Petitioner by way of suspension of his theatre permit due to alleged violations of SDMC §§ 33.3610(e), (f) and (g). That is, alleged violation of the six (6) foot distance between patron and nude entertainer. Regulatory action was initiated to suspend Petitioner's theatre permit for thirty (30) days. This action led to an administrative hearing at which time the factual violations were stipulated and the matter was submitted on the legal issues. The hearing officer decided

to uphold the action of Respondent. However, he refused to rule on the constitutionality of the subject ordinances.

After the San Diego City Council denied Petitioner's appeal the San Diego Police Department issued a letter to petitioner on September 22, 1988, advising him that a thirty-day suspension would commence on October 1, 1988, thus putting petitioner out of business for said period.

Petitioner filed his Complaint in state court for Declaratory Relief and Injunctive Relief (to determine validity of ordinance) on September 30, 1988, and obtained a Temporary Restraining Order against the imposition of the subject suspension along with obtaining a

Preliminary Injunction against imposing same, issued November 20, 1988.

Respondents filed their Motion for Summary Judgment on November 30, 1988. Said Motion was heard on January 27, 1989. The Honorable James R. Milliken rendered his "Memorandum Decision" on the Respondents/Defendants' Motion on February 22, 1989 (Appendix "B"), and an Order for Entry and granting of same on March 3, 1989.

Petitioner filed his Notice of Appeal on March 8, 1989.

The thrust of said Memorandum Decision was based upon a finding that the subject ordinance, SDMC §33.3610(e),(f), and (g), withstands a constitutional challenge by Petitioner on the presumption of

favoring validity and the fact that mere doubt is not a reason for a judicial declaration of invalidity.

Petitioner's plea of error by the lower court in its determination based upon a presumption of validity of the type of ordinance involved was not persuasive when presented to the state appellate court.

The Petitioner's petition for review of the state appellate court's decision regarding constitutionality, and the mere presumption of validity of same, was denied by the State of California Supreme Court of the State of California.

REASONS FOR GRANTING THE WRIT

I

Presumption of Unconstitutionality Applies to City Ordinance Regulating the First Amendment Interest of Petitioner.

Petitioner challenged the constitutionality of an ordinance enacted by the Respondent, City of San Diego, in the form of a civil action for declaratory relief. The subject ordinance sought to regulate certain aspects of Petitioner's business which were protected by the First Amendment. More specifically, the regulation sought to limit the place, and manner of certain theatrical nude presentations presented by Petitioner by way of minimum distance requirements between patrons and the theatrical

nude performers.

The lower court granted an application for summary adjudication in favor of the Defendants/ Respondents, on the specific finding that the subject ordinance was presumed to be constitutional. The state court of appeal solidified said finding by way of affirmation.

By it's affirmation the state court of appeal ostensibly considered the dictates of the decision of the Supreme Court of the State of California in Morris v. Municipal Court (1982) 32 Cal.3d 533, and BSA, Inc. v. King County, (9th Cir. 1986) 804 F.2d 1104.

In the instant case there is a total void of any evidence in support of the proposition that the subject ordinance in regulating the

place, and manner of protected speech was founded on the concept of the furtherance of significant governmental interests.

Morris, supra, specifically held that the regulation of a First Amendment interest, in the context of a nude theatrical presentation, at a location where there is no alcoholic beverages served, is presumed to be unconstitutional.

The lower court, and the court of appeal, resorted to a presumption of constitutionality of the regulatory ordinance per se, simply on the face of the subject ordinance; said resolution is erroneous.

II

The Proper Regulation Of First Amendment Interests In Terms Of Time, Place, and Manner, Requires A Showing Of Furtherance Of Significant Governmental Interest

In the instant case there has been no showing whatsoever to support the proposition of substantial governmental interest in regulation of First Amendment safeguards involved.

It should be noted that regulation of protected speech will be upheld if necessary to further significant governmental interests. Ellwest Stereo Theaters, Inc. v. Wenner, 681 F. 1243, 1245 (9th Cir. 1982).

In BSA, Inc., supra, the court specifically addressed the question of "significant governmental

interests" in terms of the affidavits of two law enforcement officers which allegedly satisfied the foundational requirements. In the instant case there is a total void to support the proposition of "significant governmental interests".

As a matter of fact the only foundation to support the proposition of "significant governmental interests" is the bare existence of the subject ordinance. Said support is totally inadequate at best.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Review by this Court is necessary on the grounds that the decision of the Court of Appeals and affirmation by way of denial of review of same by the Supreme Court of the State of California is not in line with the authorities cited herein and this Court's ruling is necessary to secure uniformity of decision. There are important questions of law which are in issue herein requiring settlement by the court below and the Court of Appeals' decision exceeded the limits of jurisdiction afforded by ruling diametrically in opposition to the decision of the Supreme Court of the

State of California.

DATED: 11/12/90

Respectfully submitted,

SEBASTIAN D'AMICO
Attorney for Petitioner,
PAUL A. RICHTER, an
individual, dba
"THE BODY SHOP"

APPENDIX "A"

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One, No. D009709
S016414

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PAUL A. RICHTER, Appellant

v.

CITY OF SAN DIEGO Et Al., Respondents

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

[Supreme Court filed August 15, 1990]

/s/ PANELLA
Chief Justice

APPENDIX "B"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL A. RICHTER,	)	
	)	
Plaintiff and Appellant,	)	D009709
	)	
v.	)	(Super. Ct. No. 604265)
	)	
CITY OF SAN DIEGO, et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgment of the Superior Court of San Diego County, James R. Milliken, Judge. Affirmed.

Plaintiff Paul A. Richter, doing business as The Body Shop, appeals a summary judgment favoring defendants, City of San Diego and Robert Burgreen, Chief of Police of the City of San Diego (together San Diego) on

his claim San Diego's nude entertainment ordinance (San Diego Mun. Code,[1/] Div. 36, §§ 33.3601 et seq.) is unconstitutional, did not apply to his business and had been selectively enforced against his business. On appeal, Richter contends the superior court erred in granting San Diego's motion for summary judgment because the court improperly presumed the constitutionality of the ordinances, erroneously concluded they were constitutional and erred in finding there were no triable issues of fact, including whether the ordinances had been selectively applied to him. We affirm.

1/ All statutory references are to the San Diego Municipal Code unless otherwise specified.

FACTUAL AND PROCEDURAL HISTORY

The Body Shop is a theater in San Diego which offers nude dancing as live entertainment. It does not sell alcoholic beverages. Between August 1987 and March 1988 San Diego's vice detectives observed at The Body Shop near-continuous violation of an ordiance requiring nude entertainers to remain six feet away from patrons. In April 1988, San Diego suspended Richter's theater permit for 30 days. After exhausting his administrative remedies, Richter filed suit against San Diego, asking the superior court to declare the ordinance inapplicable to his business, unconstitutional as applied to him and to restrain enforcement of the 30-day permit suspension. The court granted Richter a preliminary injunction

against enforcement of the suspension. On November 30, 1988, San Diego successfully moved for summary judgment.

DISCUSSION

I

Interpretation of the Ordinance

Division 36 of the San Diego Municipal Code regulates nude entertainment businesses in the City of San Diego. The City has declared:

> "[T]he purpose and intent of [Division 36 is] to provide for the orderly regulation of the business of nude entertainment and nude entertainers in the City of San Diego by establishing certain minimum standards for the conduct of this type of business to protect the public order and the general welfare of the residents

of the City of San Diego." (§ 33.3602.)

"Nude entertainment" is defined as "any activity where a nude person provides services, including, but not limited to, talking, reading, listening, singing, posing, walking, dancing, or wrestling." (§ 33.3604, subd. (c).) A "nude entertainment business" is defined as "any establishment or business where any individual, firm, association, partnership, corporation, or combination of individuals engages in, conducts, carries on or permits to be engaged in, conducted, or carried on 'nude entertainment,' . . . . It includes an adult cabaret, and bars and other establishments commonly known as 'topless.'" (§ 33.3604, subd. (b).) The ordinance

requires a nude entertainment business to obtain a license and comply with certain regulations. (§§ 33.3605, 33.3610.) The regulations imposed on nude entertainment businesses are contained in section 33.3610:

> "No person, association, partnership, or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of nude entertainment business unless each and all of the following requirements are met:
>
> "(a) Each person employed or acting as a nude entertainer shall have a valid permit issued pursuant to the provisions of this Division, and it shall be unlawful for any owner, operator,

responsible managing employee, manager or permittee in charge of or in control of a nude business to employ or permit any person to act as a nude entertainer who is not in possession of a valid, unrevoked Nude Entertainer Permit, which permit shall be prominently displayed with the permit required of the business.

"(b) The possession of a valid Nude Entertainment Business License does not authorize the possessor to perform services for which a Nude Entertainer Permit is required.

"(c) It shall be unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of a nude entertainment business to allow any person below the age of

eighteen (18) years upon the premises or within the confines of any nude entertainment business.

"(d) Nude entertainment services shall be conducted or carried on only between the hours of 6 a.m. and 2 a.m. of the following day.

"(e) No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises. . . .

"(f) No responsible person, as defined in this Article, shall permit or allow at licensed premises any patron to approach within six feet of a nude entertainer, or permit or allow a nude entertainer to approach within six (6) feet of a patron...

"(g) All employees of nude entertainment businesses, other

than nude entertainers while performing, shall, at a minimum while on or about licensed premises, wear an opaque covering which covers the genitals, pubic hair, buttocks, perineum, anus or anal region, and the breasts of a female including the areola thereof. Regulatory only with this Article." (Emphasis added.)

Exemptions are contained in section 33.3615 which provides in pertinent part:

"Except as to the provisions of Section 33.3610 (e), (f), and (g), the provisions of this Division shall not apply to the following:

"(a) Any theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. . . ."

Richter claims the "six-foot rule" of section 33.3610, subdivisions (e) and (f) are not applicable to The Body Shop because the rule, by its terms, applies only to "licensed premises," i.e., licensed nude entertainment businesses, and his business is not such a licensed premise; The Body Shop is a theater operating under a theater permit.

The fundamental goal of statutory construction is to ascertain the legislators' intent so as to effectuate the purpose of the law. (T.M. Cobb Co. v. Superior Court (1984) 36 Cal.3d 273, 277.) In determining such intent, the court first looks to the words of the statute, attempting to give effect to the usual, ordinary import of the language and to avoid making any

language mere surplusage. (See Regents of University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601, 607; Fontana Unified School Dist. v. Burman (1988) 45 Cal.3d 208, 219.) The words must be construed in context in light of the nature and obvious purpose of the ordinance where they appear. (See Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658-659.) The various parts of an ordinance must be harmonized in context of the statutory framework as a whole. (See Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230-231; Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal.3d 736, 746.) Finally, the ordinance "must be given a reasonable and

commonsense interpretation consistent with the apparent purpose and intention of the [City], practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. (Citations.]" (Beaty v. Imperial Irrigation Dist. (1986) 186 Cal.App.3d 897, 902; see also Webster v. Superior Court (1988) 46 Cal.3d 338, 344.)

Here, the stated purpose of the ordinance is to regulate nude entertainment in the City. The ordinance seeks to reach this goal by requiring nude entertainment businesses to obtain licenses, nude entertainers to obtain permits and for both to comply with various regulations. The regulations imposed on nude entertainment business are

in addition to the licensing and permit requirements; the ordinance specifically states "No person, association, partnership, or corporation shall engage in. . . the operation of nude entertainment business unless each and all" of its regulations are met. (§ 33.3610, emphasis added.)

As Richter points out some of the regulations contained in section 33.3610 refer to "licensed premises." The six-foot rule contained in subdivision (e) of section 33.3610 provides "No nude entertainer shall dance with or otherwise be within six (6) feet of a patron while on licensed premises." (Emphasis added.) This language must be viewed in context of the language used in section 33.3615, the section labeled

"Exemptions." Section 33.3615 states that Division "shall not apply" to a theater "[e]xcept as to the provisions of Section 33.3610 (e), (f), and (g)," that is the six-foot and non-entertainer clothing rules. Section 33.3615 exempts theaters from the licensing requirements of the ordinance and thus theaters would not be a "licensed premise" as defined by the ordinance. 2/ Under Richter's interpretation, since a theater is technically not a "licensed premise," then the six-foot rule of section 33.3610, subdivisions (e) and (f) do

---

2/ The ordinance provides: "Whenever used in this Division, . . . [¶] 'License' shall mean the business license to operate a nude entertainment business required by this division." (§ 33.3604, subd. (e).)

not apply to a theater. This interpretation, however, would render section 33.3615 mere surplusage; it would give no effect to the City's clear intent to require a theater, exempted from licensing and other regulations of the ordinance, to comply with the six-foot and non-entertainer clothing rules. Richter's interpretation would also nullify section 33.3610's clear intent to prohibit all businesses from offering nude entertainment "unless each and all" of the section's regulations are met.

In order to effectuate the legislative intent of the ordinance, section 33.3610 must be interpreted as applying to the six-foot and non-entertainer clothing rules to all nude entertainment notwithstanding

the section' sue of the phrase "licensed premises." This phrase, when read in context of the ordinance as a whole, was inadvertent and not intended to restrict the six-foot rule to businesses which have a nude entertainment license. The overall statutory framework makes it clear that the six-foot rule is intended to also apply to theaters as indicated by the fact that the only section in the ordinance which specifically addresses theaters, theaters are specifically not exempted from the six-foot rule. Since Richter's business is a theater which provides nude entertainment, he was required to comply with the six-foot rule.

II

Selective Law Enforcement

Richter contends summary judgment is improper because there are triable issues of fact as to whether the ordinance was selectively enforced against The Body Shop.

Summary judgment is improper if there are triable issues of material fact. (See Lichty v. Sickels (1983) 149 Cal.App.3d 696, 699.) On summary judgment, the moving party bears the burden of furnishing supporting documents to establish the opposing party's claims are entirely without merit on any legal theory. (Lipson v. Superior Court (1982) 31 Cal.3d 362, 364.) In opposing summary judgment, the plaintiff may not rely on the verified pleadings alone but must file an affidavit in opposition

to the motion. (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 293, p. 591.) A bare conclusion of law is insufficient to create a triable issue of fact even when the conclusion is not uncontradicted. (Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal.App.3d 1130, 1137.) "The affidavits must cite evidentiary facts, not legal conclusions or 'ultimate' facts. [Citation.]" (Hayman v. Block (1986) 176 Cal.App.3d 629, 639.)

To prevail on a claim of selective prosecution, an individual must show (1) he was deliberately singled out for prosecution based upon an invidious or unjustifiable standard and (2) he would not have been

singled out except for the discriminatory design of the prosecutor. (People v. Superior Court (Hartway) (1977) 19 Cal.3d 338, 348,; Murgia v. Municipal Court (1975) 15 Cal.3d 286, 293.) Because "[i]t is presumed that official duty has been regularly performed," a person claiming selective enforcement has the burden of proving at trial that he has been the victim of discriminatory prosecution. (Evid. Code, § 664; People v. Smith (1984) 155 Cal.App.3d 1103, 1128-1131, cert. den. 469 U.S. 1160.) A prosecution which results from an intent to punish a defendant for belonging to a class or exercising rights protected by the equal protection clause cannot be sustained. (People v. Smith, supra, 155 Cal.App.3d 1103, 1133.)

Here, Richter submitted a declaration stating San Diego had "attempted to selectively enforce such ordinances under Division 36 against myself and my business" and that "[t]he selective enforcement by Defendants of said ordinances has created confusion and guess work as to my rights and obligations." San Diego did not submit any affidavits contradicting this declaration, i.e., declaring that it had fairly enforced the ordinance. At the hearing on the summary judgment motion, San Diego urged the court to take judicial notice of the court's records, explaining:

"There's only two of these places, this one and one next-door. And they just lost on the exact same thing two weeks ago. We took the

exact same enforcement action against both of them. They both did the same response. This is the second motion for summary judmgnet. When you've got a hundred percent enforcement, you can't disclaim equal protection."

The trial judge, who was apparently also involved in the other case, said "Okay." Richter's attorney responded: "I thank counsel for his point in bringing to the court's attention that there's only two places in the County of San Diego that apply. Okay. That would be one -- under the exceptions, that would be one of the arguments in terms of selective law enforcement." He also asserted he had "a series ... of potential deponents in this particular case."

The court here, in granting summary judgment, stated:

"The Court relies on establish case law which says that 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconsitutionality clearly, positively and unmistakably appears.' [In re Dennis M., 70 Cal.2d 444, Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, In re Benson, 172 C.A.3d 532] Notwithstanding, a dirth of evidence from the City as to the actual legislative purpose for the statute, the Court believes on these facts, with no infringement

on first amendment rights to expression, that the presumption of validity of the statute in light of the circumstances should be applied.

"The plaintiff has had several opportunities to offer evidence of unconstitutionality based on the other grounds asserted in the complaint. There is no evidence before us, for example, of selective enforcement of the statute."

It might appear the court, in granting summary judgment, erroneously relied on the presumption and placed the burden of proof on Richter. However, the record shows San Diego asking the court to take judicial notice of its own files as to another case involving enforcement

of the same ordinance. San Diego represented this was the only other business similar to The Body Shop and that the ordinance had been applied also to this other business. The court apparently took judicial notice of this other case and Richter essentially conceded there was only one business similar to his in San Diego and that this other business was the subject of another enforcement action. At the hearing, Richter did not contest these facts nor bring other facts to the court's attention to support his claim the ordinance had been selectively enforced; rather he made a vague reference of the existence of "potential deponents" without stating who they might be or what they might testify to. Richter's declaration

filed in opposition to the summary judgment motion contained only conclusonary allegations to support his claim of selective enforcement. Under these circumstances, San Diego was entitled to summary judmgnet. (See 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 288, p. 587.) San Diego offered facts, through the court taking judicial notice of its own files, indicating the ordinance had been fairly enforced. Richter failed to offer any facts to contest this evidence and only the most conclusory facts to support his claim of selective enforcement. There were no triable issues of fact on this question and summary judgment was properly granted on the claim of selective enforcement and the due

process and equal protection claims which were premised on the claim of selective enforcement.

III

Overbreadth

Richter contends the ordinances are overbroad.

In Morris v. Municipal Court (1982) 32 Cal.3d 553, 564, the California Supreme Court stated:

> "(1) A ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech. Nonobscene nude dancing cannot be barred without, in some cases, infringing upon constitutionally protect expression. [Fn. omitted.] (2) An enactment prohibiting nonobscene nude dancing which extends beyond

establishments serving alcohol is presumptively overboard. [Fn. omitted.]"

Since The Body Shop does not serve alcoholic beverages, an ordinance banning nude dancing at The Body Shop would be presumptively overbroad. However, Division 36 does not prohibit nude dancing at The Body Shop or similar establishments On the contrary, Division 36 specifically permits nude entertainment and delineates a licensing and regulation system for nude-entertainment businesses in the City of San Diego.

The constitution does not ban all regulation affecting First Amendment interests. "Regulations of the time, place, or manner of protected speech will be upheld if necessary to

further significant governmental interests. [Citation.]" (BSA, Inc. v. King County (9th Cir. 1986) 804 F.2d 1104, 1111.) In the BSA case, the Ninth Circuit considered the validity of two local ordinances which required all nude entertainment to be perform on a stage eighteen inches high and six feet from the nearest patron. The Court upheld the validity of the ordinances, stating:

> "We note at the outset that BSA and Chase have failed to explain how the distance requirement impinges upon their First Amendment rights. The requirement does not prohibit nude entertainment. It also does not diminish the expressiveness of nude entertainment. There is no allegation that the distance

between entertainer and patron is an integral part of the expressive activity, or that 'the viewing public is [less able] to satisfy its appetite for sexually explicit fare.' [Citation.]

"Even assuming, however, that the distance requirement does burden protected expression, it is a valid place or manner regulation. Regulations of the time, place, or manner of protected speech will be upheld if necessary to further significant governmental interests. [Citation.] Curtailing public sexual contact and sexual criminal offenses represents a significant state interest. [Citation.] The six-foot/eighteen inch distance requirement furthers this interest

by keeping nude entertainers just out of reach of the nearest patron." (Id. at p. 1111.)

We find this reasoning persuasive. Accordingly, we conclude the six-foot rule here is a reasonable place or manner restriction.

DISPOSITION

The summary judgment is affirmed.

/s/ KREMER
P.J.

WE CONCUR:

/s/ FROEHLICH
J.

/s/ NARES
J.

APPENDIX "C"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

PAUL A. RICHTER, an individual dba "THE BODY SHOP",	)	No. 604265
Plaintiff,	)	
vs.	)	MEMORANDUM DECISION
THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego, et al.,	)	
Defendant.	)	

The City's motion for Summary Judgment came before the Court on January 27, 1989. Sebastian D'Amico represented the plaintiff and Grant Telfer represented the City.

Plaintiff challenges the constitutionality of Municipal Code Chapter III, Article 3, Division 36, specifically, sections 33.3610(e), (f) and (g) on the grounds of vagueness, cruel and unusual

punishment, and equal protection. This municipal ordinance requires that nude dancers stay six feet away from the patrons. Plaintiff asserts that this ordinance does not apply to his establishment, "The Body Shop", since it is licensed as a "theater" and not for nude entertainment.

Although the municipal ordinance in question is grammatically unfortunate, it is not unconstitutionally vague. A clear reading of this statute necessitates the conclusion that the six foot restriction does apply to plaintiff's establishment.

The Court relies on established case law which says that "All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient

reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconsitutionality clearly, positively and unmistakably appears." [In re Dennis M., 70 Cal.2d 444, Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, In re Benson, 172 C.A.3d 532] Notwithstanding, a dirth of evidence from the City as to the actual legislative purpose of the statute, the Court believes on these facts, with no infringement on first amendment rights to expression, that the presumption of validity of the statute in light of the circumstances should be applied.

The plaintiff has had several opportunities to offer evidence of unconstitutionality based on the other grounds asserted in the

complaint. There is no evidence before us, for example, of selective enforcement of the statute.

The Court grants the City's motion for summary judmgnet.

DATED: February 22, 1989.

/s/ JAMES R. MILLIKEN